IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. [redacted] 26

JAMES EDMUND GROPPI,

Appellant,

—vs.—

STATE OF WISCONSIN,

Respondent.

ON APPEAL FROM THE SUPREME COURT OF WISCONSIN

JURISDICTIONAL STATEMENT

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Opinion Below

The opinion of the Supreme Court of Wisconsin is reported at 41 Wis.2d 312, 164 N.W. 2d 266 (1969) and is set forth in the Appendix, *infra* pp. 1a-24a.

Jurisdiction

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(2), this being an appeal which draws into question the validity of W.S.A. §956.03(3) *infra*, p. 2, on the ground that it is repugnant to the Constitution of the United States.

Appellant was convicted of resisting arrest in the Circuit Court of Milwaukee County. A change of venue and motion to dismiss were denied on the ground that W.S.A. §956.03(3) did not permit a change of venue in a misde-

meanor case. On appeal, his conviction and sentence were affirmed on February 4, 1969. On April 1, 1969 a petition for rehearing was denied. Timely notice of appeal to this Court was filed in the Supreme Court of Wisconsin on May 6, 1969. As the Supreme Court of Wisconsin explicitly rejected appellant's challenge to W.S.A. §956.03(3), this matter is appropriately brought to this Court by appeal. See e.g. *Sibron* v. *New York*, 392 U.S. 40 (1968).

In the event that the Court does not consider appeal the proper mode of review, appellant requests that the papers whereupon this appeal is taken be regarded and acted upon as a petition for writ of certiorari pursuant to 28 U.S.C. §2103.

Constitutional and Statutory Provisions Involved

This case involves the Sixth and Fourteenth Amendments to the Constitution of the United States.

This case also involves §956.03(3) of Wisconsin Statutes, which states:

> If a defendant who is charged with a felony files his affidavit that an impartial trial cannot be had in the county, the court may change the venue of the action to any county where an impartial trial can be had. Only one change may be granted under this subsection.

Question Presented

Whether W.S.A. §956.03(3), which prohibits Wisconsin trial courts from granting a change of venue when an impartial trial cannot be had because of community prejudice in a misdemeanor case, violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment?

Statement

Appellant James E. Groppi, a Roman Catholic priest, was charged with resisting arrest under W.S.A. §946.41, a misdemeanor punishable by a maximum of one year imprisonment in a county jail and a five hundred dollar fine, as a result of an incident arising out of a civil rights march in Milwaukee, Wisconsin on August 31, 1967 (R. 22, 90, 92).[1] Father Groppi was convicted by a jury of resisting arrest on February 9, 1968 (R. 175) and sentenced to six months in prison and a fine of five hundred dollars. The six month sentence was stayed and appellant was placed on two years probation (R. 185). If the five-hundred dollar fine were not paid within twenty-four hours, appellant was to serve an additional six months in prison.

On February 4, 1969, the Supreme Court of Wisconsin affirmed appellant's conviction and sentence. Chief Judge Hallows, concurred, and Judges Heffernan and Wilkie dissented. A petition for rehearing was denied on April 1, 1969.

1. Events Prior to Appellant's Charge for Resisting Arrest.

Prior to and during the incidents that led to his arrest, appellant was advisor to the Youth Council of the Milwaukee Chapter of the National Association for the Ad-

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[1] Specifically, appellant was charged with:

> Unlawfully, knowingly resist[ing] Wilfred Buchanan, duly appointed and qualified, and acting police officer of the City of Milwaukee, in said county, while the said Wilfred Buchanan was then and there engaged in doing an act in his official capacity, and with lawful authority, to wit: . . . while said defendant was being carried to a police wagon, after being placed under arrest, said defendant began kicking his legs, striking said officer, Wilfred Buchanan in the body with his foot, that said defendant [swore at Wilfred Buchanan] (R. 20)

vancement of Colored People (hereinafter NAACP), a group active in the Milwaukee area in support of efforts of Negro citizens to obtain equal civil rights.

On August 30, 1967, the Mayor of Milwaukee issued a proclamation prohibiting all "marches, parades, demonstrations, or other similar activities" in Milwaukee between the hours of 4 P.M. and 9 A.M. for a thirty-day period (R. 55). The proclamation was the Mayor's response to several civil rights demonstrations and marches in the Milwaukee area "for a fair housing bill, to consider the right of movemnet within the confines of our country . . ." (R. 93).

On August 31, 1967, Father Groppi along with "an assembly of black and white people from the community met at St. Boniface's Church [located at the corner of North 11th and West Meinecke] to discuss the Mayor's Proclamation, the demonstrations, and the arrest of Youth Council members and the people of the community on the previous night" (R. 93). Between 7 P.M. and 8 P.M. three to four hundred persons from that assembly decided to march from the church to City Hall in order to "question the Mayor on the Proclamation" (R. 95). They marched very slowly in a peaceful and orderly fashion (R. 36), three or four abreast, arms locked, south on North Eleventh Street (R. 22, 30, 36, 90). Father Groppi was one of those at the head of the march (R. 103). The group turned east on West North Avenue, and continued marching (R. 30, 36).

While the group was still on North Eleventh Street, prior to marching down West North Avenue, Inspector Ullius of the Milwaukee Police Department announced that the march was in violation of the Mayor's proclamation (R. 31). Although Ullius used a bullhorn and repeated a

demand that the marchers disperse, he testified that because of the "singing and booing," he did not know how many marchers actually heard the warning (R. 31, 35). Appellant himself testified that he did not recall hearing any warning, although he did not deny that in fact it might have been given (R. 91, 103).

When the march continued Inspector Ullius ordered "police action to stop the march" (R. 32, 36). Patrolman Armando Brazzoni, who had been walking alongside Father Groppi, immediately arrested the appellant (R. 37, 49, 56) "grabb[ing]" him "around the right shoulder and collar" (R. 56). There is no contention that Father Groppi offered any resistance. Patrolman Brazzoni and a Sergeant Miller took Father Groppi to a waiting paddy wagon (R. 41, 57). After walking some twenty or thirty yards with the officers, and as he approached the paddy wagon (R. 105) Father Groppi "became limp in body and sat in the street" (R. 41, 57, 91). Father Groppi's "going limp" was not contested (R. 106)[2] nor was it a basis for the resisting arrest charge (R. 165, 167).

2. The Resisting Arrest Charge.

Events subsequent to Father Groppi's "going limp" formed the basis of the charge of resisting arrest (R. 165, 167). The police and appellant's version of these events were in sharp conflict. The State called as witnesses the three police officers who "carried" Father Groppi from his "limp" position on the street to the paddy wagon (R. 41, 56, 73). Defense counsel called Father Groppi (R. 91), two newspaper reporters (R. 133, 138), and three marchers

[2] When asked why he went limp, Father Groppi responded, "I was arrested a number of times in Civil Rights demonstrations, going limp, does not constitute resisting arrest and I went limp" (R. 106).

(R. 116, 141, 151), all of whom were near Father Groppi when the alleged resistance occurred (R. 95, 134, 138, 121, 144, 155).

Patrolman Brazzoni, testified that after giving his shotgun to another officer (R. 57) he picked Father Groppi up from his limp position by the "upper part of the body, by the shoulders" (R. 42). At the same time Sergeant Miller picked up his right leg and Officer Buchanan his left leg (R. 42). Buchanan had his night stick in a hand that was around Groppi's leg (R. 75, 78, 79). The officers then carried Father Groppi to the paddy wagon (R. 42, 57, 75). Sergeant Miller testified that as they neared the wagon "Father Groppi suddenly became violent . . . He kicked out with his left leg at Officer Buchanan, catching him in the chest and he [appellant] hollered out, 'let go of my leg you———-.'" (R. 44). Officer Brazzoni testified similarly but added that Father Groppi was kicking his feet "in a motion, like pedaling a bicycle" during the entire time he was being carried (R. 58-60). When they arrived at the wagon, Father Groppi's "body jerked." "I don't know what caused the jerk" (R. 60). He stated that as Father Groppi jerked he said, "I want that man's badge number" (referring to Officer Buchanan) (R. 62). Buchanan's testimony did not materially differ from Brazzoni's. He stated that Father Groppi's jerk or kick landed on Buchanan's chest, pushing him to one knee (R. 76).

Father Groppi denied the officer's version of the facts. While being carried to the wagon "My foot began to hurt . . . as if someone were digging their fingernails into my foot . . . (R. 96). The gouging continued and as he arrived near the wagon he said to officer Brazzoni: "he is gouging his fingers into my foot," and asked, "what is that officer's [Buchanan's] badge number . . . I noticed he wasn't wearing a badge. . . ." Officer Brazzoni said "that is for you

to find out." (R. 97).[3] Groppi conceded that he "did react to the pressure placed on his leg" but only by attempting to wiggle his foot free of the gouging. He flatly denied, however, that he had "kick[ed] the officer in the chest." (R. 98-99)

A reporter for the Milwaukee *Journal*, who was approximately 15 to 20 feet from the paddy wagon, testified that "at no time when I was in the vicinity, did I hear him use any profanity". (R. 133-134) The Chief photographer from WISN T.V., who was also standing fifteen feet from the paddy wagon, stated that he did not see Father Groppi kick a police officer or hear him use profanity (R. 138).

Three other defense witnesses all of whom were arrested as marchers, testified that they saw no kicking and heard no profanity. On the contrary, they stated that Father Groppi was complaining about the "gouging of his foot while being carried" (R. 120-21, 144-147, 155). Prentice McKinney said he heard Father Groppi "telling the other officer to make this—this other officer quit gouging his leg" (R. 144). Mike Cullen testified that appellant called out "my leg, my leg" as he was carried to the paddy wagon. Terry Astuto heard appellant say that an officer was "gouging out my foot" (R. 122).

3. Proceedings in Trial Court.

On September 26, 1967 appellant moved for a change of venue from the Circuit Court of Milwaukee County. The motion stated, *inter alia*, that the defendant "requests that [the] Court take judicial notice of the massive coverage by all news media . . . or in the alternative that the defendant be permitted to offer proof of the nature and extent

[3] Officer Buchanan was asked on cross-examination why he didn't wear a badge on the night of August 31. He responded that he was "under orders from the Department" not to wear one and he further stated, "I don't question my superiors." (R. 77)

thereof . . ." In an affidavit he alleged that he had received massive and frequently adverse news coverage and publicity, as well as critical editorials, by all of the news media in Milwaukee County. The motion was denied by the trial judge "because this is a misdemeanor case and not a felony. And the Wisconsin statute does not provide for a change of venue in a misdemeanor matter." (Ruling on Motion for Change of Venue, October 2, 1967). On December 11, 1967, appellant entered a plea of not guilty, but soon after his trial began a juror became ill and a mistrial was declared. The case was continued to February 8, 1968.

On January 10, 1968, appellant filed a motion to dismiss on the grounds that the Wisconsin statute which provided for a change of venue, W.S.A. §956.03(3), was unconstitutional because it prohibited a change of venue in misdemeanor prosecutions.[4] Appellant also moved to dismiss the resisting arrest charge on the ground that the Mayor's proclamation prohibiting all demonstrations in the City of Milwaukee was unconstitutional (R. 14), but this motion was subsequently withdrawn on the ground that the question was pending before a federal court (R. 14).

On February 8, 1968, the Circuit Court of Milwaukee County denied the "motion to dismiss on the grounds of §956.03(3) that it is unconstitutional" (R. 18). Subsequently, this colloquy took place:

> Mr. Jacobson [Defense Counsel]: On that last motion Your Honor, to make sure for the record, they had a—

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[4] Section 956.03(3) states:

> If a defendant who is charged with a felony files his affidavit that an impartial trial cannot be held in the county, the court may change the venue of the action to any county where an impartial trial can be had. Only one change may be granted under this subsection.

The Court: The prior—[referring to prior hearing on Oct. 2]

Mr. Jacobson: The basis for this particular motion the Court denied a change of venue, because of community prejudice, and the rationale of the Court was that the statute only provided a change of venue to community [sic] felonies, and not in misdemeanors.

The Court: That's right.

Mr. Jacobson: Therefore at this time the defendant's counsel on behalf of the Defendant, has challenged the constitutionality of the change of venue, to community prejudice statute [sic], on the basis that it is a denial of equal protection to criminals, or alleged criminals, on a basis of a serious line of demarcation, of one year, that is what separates a misdemeanor from a felony. However, we have an infraction of fundamental rights at issue and that, that statute has really no foundation, so we are attacking it on that basis, of equal protection.

The Court: My motion to dismiss is on the grounds that it is a matter for the legislature, and not the Courts, so the motion to dismiss on the change of venue, on the grounds that section is unconstitutional, because it provides for a change of venue, is denied. Now, that we have all these motions disposed of, we will proceed on this case, on its merits, and we will proceed to select a jury (R. 17-19).

After verdict of guilty was returned by the jury on February 9, 1968, appellant made a motion for an order setting aside the jury verdict in part on the grounds that "the trial court erred in denying defendant's motion for a change of venue on the ground of community prejudice. . ."; ". . . that the change of venue statute, §956.03(3) is unconstitu-

tional that it denies to a defendant who is charged with a misdemeanor offense a fair trial as required by the Fourteenth Amendment of the United States Constitution." (R. 57-59). The circuit court denied the motion.

How the Federal Questions Were Raised and Decided Below

Prior to trial, appellant moved for a change of venue and to dismiss the complaint on the ground that W.S.A. §956.03(3), which purports to limit a change of venue to felony cases, violated the Fourteenth Amendment. Both motions were denied, the trial court at one point stating that:

> "... (T)he change of venue asked for in the motion for a change of venue will be denied; it is not being provided for in the Wisconsin Statutes ... I'm denying the motion for a change of venue because this is a misdemeanor case and not a felony. And the Wisconsin Statute does not provide for a change of venue in a misdemeanor matter ... Not in a misdemeanor matter; a felony only." (R. 10, 11)

See also the colloquy set forth at pp. 8, 9 *supra*. A motion for a verdict of acquittal notwithstanding the verdict or, alternatively, for a new trial, based, inter alia, upon the alleged unconstitutionality of W.S.A. §956.03(3) under the Due Process and Equal Protection Clauses of the Fourteenth Amendment was denied (R. 57-59).

On appeal, the Supreme Court of Wisconsin stated the question before it as follows:

> Is sec. 956.03(3), Stats., unconstitutional either on its face or as applied in this case? (*infra*, p. 2a)

The court then stated appellant's contentions concerning the statute as it understood them:

> Appellant claims the change of venue statute is unconstitutional on several different grounds: First, that the statute, on its face, is a violation of due process as guaranteed by the Wisconsin and federal constitutions; second, that the face of the statute violates the equal protection clause of the federal constitution. And, finally, it is contended that the statute was unconstitutionally applied in this case. In all cases, the reason for the alleged unconstitutionality is the same, i.e., that the change of venue based on community prejudice is limited to felony cases. (*infra*, p. 3a)

The majority opinion of Supreme Court squarely rejected appellant's contention:

> We think that there is a sufficient difference between a felony and a misdemeanor to warrant the distinction . . . Moreover, it would be extremely unusual for a community as a whole to prejudge the guilt of any person charged with a misdemeanor. Ordinarily community prejudice arises when a particularly horrendous crime has been perpetrated. These are the only crimes that receive widespread and prolonged attention from the news media. But the general public just does not become incensed at the commission of a misdemeanor.
>
> The court also takes judicial notice of the vast number of misdemeanors that are prosecuted as opposed to felonies. As a matter of necessity, the prosecution of misdemeanors has been simplified as much as possible by the legislature. This is not because the legis-

lature is not concerned with justice, but because society demands that efficiency in the administration of justice be given consideration along with absolute fairness. (*infra*, pp. 3a, 4a).

Chief Judge Hallows concurred. He agreed with the dissenting Judges that "an accused has a constitutional right to a fair trial in misdemeanor cases and to attain that end may have a change of venue if he shows community prejudice" but concluded that appellant had not been sufficiently prejudiced to require reversal (*infra*, p. 11a).

Judges Heffernan and Wilkie dissented:

The majority opinion concludes that it is just and proper to afford fewer constitutional guarantees of fairness to a misdemeanant than to a felon. On the face of it, this proposition runs counter to all principles of Anglo-American jurisprudence; however, factual distinctions, it is contended, make it fair to afford fewer protections to one charged with a misdemeanor. It is asserted in the opinion of the majority of the Court that the penalties are more severe in the case of felonies. This is, of course, true, but it is a fact entirely irrelevant to the issue. It is, in essence, an assertion that an unfairness that results in only a small sentence is of such a minor consequence as to be *de minimis*. The mere statement of the proposition is its own refutation. Concededly, the legislature has seen fit to *confer* additional safeguards to defendants accused of major crimes (preliminary hearing, e.g.); however, it is powerless to reduce the minimum safeguards of fairness that are assured by both the Wisconsin and United States Constitutions to all criminal defendants.

The opinion of the court also asserts that community prejudice is not aroused by the commission of a mis-

demeanor and that, therefore, a change of venue is needless. The simple answer to this proposition is that if there is no community prejudice, it is within the discretion of the trial judge to deny a change of venue. This determination is dependent upon the facts as they subjectively appear and not upon the objective nature of the crime or whether it is labeled a felony or a misdemeanor. The identity of the defendant and his image in the community is also relevant and may be a determining factor in whether or not there is community prejudice. (*infra*, pp. 14a, 15a)

A timely petition for rehearing was denied by the Supreme Court of Wisconsin on April 1, 1969.

The Federal Questions Are Substantial

As construed by Wisconsin's highest court, W.S.A. §956.03(3) prohibits a defendant whose constitutional right to a fair trial by an impartial jury is threatened by the existence of widespread community prejudice from obtaining a change of venue unless he is charged with an offense classified as a felony.[5] This burden on the right to fair trial guaranteed by the federal constitution—solely on the basis of extent of the punishment allowable in a criminal case—raises serious questions under both the Due Process Clause and Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.

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[5] Wisconsin law defines a felony as an offense punishable by imprisonment in the state prison; "Every other crime is a misdemeanor" W.S.A. §939.60.

I.

W.S.A. §956.03(3) Denies Appellant's Fourteenth Amendment Right to a Fair Trial by Totally Prohibiting a Change of Venue in a Serious Criminal Prosecution Regardless of the Extent of Community Prejudice.

This Court has long held that a conviction for a crime cannot stand where local community prejudice has impugned the fairness of the trial. *Irvin* v. *Dowd,* 366 U.S. 717, 723-728 (1961). "A fair trial in a fair tribunal is a basic requirement of due process." *In Re Murchsion,* 349 U.S. 133, 136 (1955). It is not surprising, therefore, that the right to a fair trial by an imparital jury is one of the Bill of Rights guarantees made binding upon the states by the Due Process Clause of the Fourteenth Amendment.[6] In *Parker* v. *Gladden,* 385 U.S. 363 (1966), the Court held that "the command of the Sixth Amendment . . . that 'the accused shall enjoy the right to a . . . trial by an impartial jury . . .' [is] made applicable to the states through the Due Process Clause of the Fourteenth Amendment." (385 U.S. at 364). See also *Rideau* v. *Louisiana,* 373 U.S. 723 (1963); *Turner* v. *Louisiana* 379 U.S. 466 (1965); *Sheppard* v. *Maxwell,* 384 U.S. 333 (1966). Indeed, the right to an impartial jury is recognized by the

[6] The decision to apply a particular guarantee of the Bill of Rights to state criminal proceedings has depended on the determination as to whether the right is "so fundamental and essential *to a fair trial* that it is incorporated in the Due Process Clause of the Fourteenth Amendment." (emphasis supplied) *Washington* v. *Texas,* 388 U.S. 14 at 17-18 (1967). In *Pointer* v. *Texas,* 380 U.S. 400 (1965) the Court stated "[t]hat the fact that [a] right appears in the Sixth Amendment of our Bill of Rights reflects the belief of the Framers of those liberties and safeguards that [it is] a fundamental right essential *to a fair trial* in a criminal prosecution." (380 U.S. at 404). See also *Duncan* v. *Louisiana,* 391 U.S. 145 (1968). If this language provides the test, application of the guarantee of an impartial trial necessarily follows.

Constitution of Wisconsin and the decisions of the Wisconsin Supreme Court. See Wisc. Const., Art. 1, §7; *State* v. *Nutley* 24 Wis. 2d 527, 129 N.W. 2d 155 (1964).[7]

Although the Supreme Court of Wisconsin concluded that if able to adopt its own cut-off point, it would make a change of venue to protect an accused's right to an impartial trial available in all cases where the penalty was greater than six months (*infra* p. 5a), the court felt itself bound by the Wisconsin legislature's determination, in W.S.A. §956.03(3), that "a change of venue based on community prejudice" was restricted to felony cases. The court held: "we are not willing to say that the cut-off point established by the legislature is necessarily arbitrary and capricious." (*infra* p. 5a).

In reaching this conclusion the court enumerated a number of differences between felonies and misdemeanors which were asserted to support the constitutionality of W.S.A. §956.03(3):

> First, the court quoted a previous decision to the effect that felonies are more seriously punished crimes than are misdemeanors.[8]
>
> Second, the court reasoned that the community only prejudges the guilt of a person charged with a "hor-

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[7] In *Duncan* v. *Louisiana*, 391 U.S. 145, 149 (1968), the Court held that "trial by jury in criminal cases is fundamental to the American scheme of justice," and that the Fourteenth Amendment guarantees a right of jury trial in all state criminal cases "which —were they tried in a federal court—would come within the Sixth Amendment's guarantee."

[8] ". . . In most cases the place of imprisonment is different; the statute of limitations is twice as long for a felony as a misdemeanor; one charged with a felony is entitled to a preliminary hearing; the stigma of a felony is greater; and under the repeater statute, more severe penalties are authorized for felonies than for misdemeanors . . ." *State ex rel. Gaynon* v. *Krueger*, 31 Wis. 2d 609, 620, 143 N.W. 2d 437 (1966).

rendous" crime that receives "widespread and prolonged attention from the news media" and that "the general public just does not become incensed at the commission of a misdemeanor."

Third, the court argued that because of the vast number of misdemeanor prosecutions, efficiency in the administration of justice would be unduly affected by making available a change or venue for misdemeanants.

Finally, the court reasoned that while both the federal and state constitutions guarantee the right to a fair and impartial trial, other methods than a change of venue ensure a fair trial.

The grounds advanced by the Supreme Court of Wisconsin simply will not bear examination as support for a statute which decrees a total bar to any change of venue in any prosecution for any crime labelled a misdemeanor.

First. The right to a fair and impartial trial cannot be diluted by denying the trial court authority to change venue simply because the penalty actually suffered by the misdemeanant may—in most but not all cases—be less than in felony cases. We would seriously doubt that there is any class of criminal case, however "petty" in terms of its authorized punishment, to which the basic due process guarantee of a fair trial by a fair tribunal is inapplicable. But, however that may be, appellant's was not a "petty" case by any conceivably applicable standard. Such is the teaching of *Duncan* v. *Louisiana*, 391 U.S. 145, 149 (1968), where this Court concluded that the federal Constitution guarantees a jury trial for all "serious offenses" but does not extend to "petty crimes."

While the Court declined to settle the exact location of the line between petty crimes and serious offenses, Wisconsin does not here claim—nor could it do so convincingly, in view of its six-month rule governing the appointment of counsel in misdemeanors cases, *State ex rel. Plutshak* v. *State Dept. of Health and Social Services*, 37 Wis.2d 713, 155 N.W.2d 567 (1968), as contrasted with the sweeping preclusion of all misdemeanors by the terms of W.S.A. §956.03(3)—that appellant was charged with a petty offense. In *Duncan*, and in *Gideon* v. *Wainwright*, 372 U.S. 335 (1963), in holding that the Sixth Amendment guarantee of the right to assistance of counsel is applicable to the states through the Fourteenth Amendment, the Court did not draw a line between felonies and misdemeanors as does W.S.A. §956.03(3). What the Eighth Circuit has said, construing *Gideon*, is applicable here:

> Indeed, consideration of the opinion in context leads us to conclude that the right to counsel must be recognized regardless of the label of the offense if, as here, the accused may be or is subjected to deprivation of his liberty for a substantial period of time. . . . It should be remembered that the Sixth Amendment makes no differentiation between misdemeanors and felonies. The right to counsel is not contingent upon the length of the sentence or the gravity of the punishment. Rather, it provides that the guarantee extends to "all criminal prosecutions." Furthermore, we note that the phrase "all criminal prosecutions" applies not only to the right to counsel but also to the right to a jury trial. Logically the phrase should be accorded the same meaning as applied to both protections. *Beck* v. *Winters*, 407 F.2d 125, 128 (8th Cir. 1969).

Nor does the fact that a legislature may provide a different statute of limitations in felony cases justify the

distinction drawn by W.S.A. §956.03(3) between felons and misdemeanants. Appellant does not argue that the state must try misdemeanor and felony cases identically, or that the state cannot treat one as a more serious violation of law than the other, but only that when the basic constitutional protection of fair trial is at stake, the state cannot arbitrarily deny the important protection provided by a change of venue simply because the crime—while serious—has a lower maximum penalty than a felony.

Second. The Wisconsin Supreme Court upheld its construction of W.S.A. §956.03(3) on the ground that there is no likelihood of community prejudice attaching to a misdemeanor prosecution. But as Judges Heffernan and Wilkie put it in dissent: "The simple answer to this proposition is that if there is no community prejudice, it is within the discretion of the trial judge to deny a change of venue." (*infra*, p. 15a). Moreover, the Supreme Court's reasoning is refuted by the facts of this case. Appellant is a controversial figure because he has spoken out and participated in marches and demonstrations against racial discrimination in his community. It is beyond dispute that his goals have stirred many to anger and hostility against him and that his "activities" have received prolonged attention from the news media in Milwaukee. It is obvious that the general public has often "become incensed", to use the language of the Wisconsin Supreme Court (*infra*, p. 4a), at his views and behavior just as portions of the general public had "become incensed" at other civil rights leaders, such as the late Reverend Doctor Martin Luther King. It is simply erroneous to assert that men like Father Groppi and Dr. King have so little stirred those opposed to them to anger as never to prejudice their right to a fair trial and it is no accident that cases involving civil

rights leaders commonly involves prosecution for alleged misdemeanors. See e.g., *Shuttlesworth* v. *Birmingham,* 373 U.S. 262 (1963); 376 U.S. 339 (1964); 382 U.S. 87 (1965); —— U.S. ——, 22 L.ed. 2d 162, 89 S.Ct. —— (1969); *Gregory* v. *Chicago,* —— U.S. ——, 22 L.ed. 2d 134, 89 S.Ct. —— (1969); *Edwards* v. *South Carolina,* 372 U.S. 229 (1963). Community prejudice arises when the activities of a person or group challenge deeply felt beliefs and feelings. It does not depend on whether a criminal charge arising out of civil rights activity is classified by state law as a misdemeanor or a felony.

It is plain that in cases such as this involving a public figure whose civil rights activity is tied to a controversial social issue—where the personal and political leanings of the jury will often be antagonistic to the defendant—the potential for an adverse factual determination of conflicting testimony is great. In civil-rights-related prosecutions this situation is not uncommon. But because of the accepted limitations of federal and state appellate review of factual determinations by state trial courts, the only effective remedy is to guarantee the accused the right to have the crucial factual determination of guilt or innocence made initially by "impartial 'indifferent' jurors" *Irvin* v. *Dowd, supra* at 366 U.S. 722. Trial by twelve jurors representing a cross-section of a community less subjected to adverse publicity does not ensure that justice will be done but it does dilute the effect of any particularized bias and tends to make it likely that persons not unfairly antagonistic to the accused will participate in the fact-finding process.

Third. The Supreme Court of Wisconsin reasoned that the exclusion of misdemeanor cases from the change of venue authorized by §956.03(3) promotes "efficiency in the administration of justice" (*infra* p. 4a) in view of the large

numbers of misdemeanor prosecutions. Such arguments did not deter this court from extending the right to jury trial to misdemeanants in *Duncan, supra.* But granting the premise that a lot of misdemeanor cases are prosecuted, and hence potentially affected by a change-of-venue rule, it is difficult to see why motions for a change in venue should be *automatically* withheld from *all* persons charged with misdemeanors. The notion that authorizing trial judges to grant or deny a change of venue in their discretion will open the floodgates to disruption in the administration of justice is unreal. Indeed, an authoritative study has concluded that motions are rarely granted even in felony prosecutions. *Standards Relating to Fair Trial and Free Press,* 121 (A.B.A. Project on Minimum Standards For Criminal Justice, 1966). It is plain that only very few of the many misdemeanor cases prosecuted could conceivably give rise to a colorable claim for a change in venue; and, if such claims were advanced in number, trial courts would still retain enormous latitude to deny the applications.

The final reason given by the Supreme Court of Wisconsin for upholding W.S.A. §956.03(3) is that appellant had a sufficient remedy to protect his right to a fair and impartial trial by means of voir dire inquiry, a motion for a continuance, or a motion to set aside the verdict after trial. To conceive the constitutional right to an impartial trial thusly is to misconceive it and to ignore the intimate relationship between the right and the remedy of a change of venue. If voir dire inquiry, or a continuance, satisfactorily protected the right, then there would never be need for a change of venue in any case, felony or misdemeanor. The plain fact is, as explicitly recognized by this Court in *Rideau* v. *Louisiana,* 373 U.S. 723, 726 (1963), and *Irvin* v. *Dowd,* 366 U.S. 717 (1961), that it is often impossible to determine, much less defeat, the subtle operation of prejudice in a

criminal trial in a particular community. The constitutional right to a fair trial, therefore, properly implies a right to a jury drawn from a community which has not been so exposed to prejudice that it will not likely be able to base its verdict on the evidence developed at trial, cf. *Thompson* v. *Louisville,* 362 U.S. 199 (1960); not merely a right to reversal if actual prejudice is shown. In some cases, a defendant may be able to obtain a fair trial panel by interrogation, or in others to put off the trial until prejudice is neutralized without undue cost to his constitutional right to a speedy trial, or in others to prove that he did not in fact receive a fair trial at the hands of a particular jury.[9] Perhaps in such cases a motion for change of venue would be properly denied, but there are also cases where these protective devices will be unavailing. By upholding W.S.A. §956.03(3), Wisconsin has determined that persons charged with misdemeanors can in *no* case receive what in some cases may be the only remedy that can assure them a fair and impartial trial.

It is of interest that the only decisions we have found squarely on point uphold appellant's view that the Supreme Court of Wisconsin erred in sustaining W.S.A. §956.03(3) as consonant with Fourteenth Amendment requirements. In one case, the facts are strikingly similar. *Mason* v. *Pamplin,* 232 F. Supp. 539 (D. Tex. 1964) *aff'd sub nom. Pamplin* v. *Mason,* 364 F.2d 1 (5th Cir. 1966), involved a clergyman, active in civil rights causes, accused of striking a police official in the course of being arrested in connection with a

[9] Common sense also rejects the notion that a defendant can obtain a fair trial and impartial jury by having a verdict set aside. Not only does this remedy put the defendant to continuous rounds of trial burdening both him and the state court system (compare *infra,* pp. 4a, 19a) but it fails to meet the constitutional requirement because it in no way ensures that the jury will ever be drawn from an unbiased source.

civil rights demonstration. His motion for a change of venue was denied because Texas statutes provided for changes of venue by reason of community prejudice only in felony cases. He was then tried and found guilty of aggravated assault upon a police officer, a misdemeanor in Texas. After exhausting his state remedies, he challenged this conviction in a habeas corpus petition in federal court. The court held that the statute authorizing change of venue only in felony prosecutions violated the Due Process Clause of the Fourteenth Amendment, reasoning that under our system of law there is an "inherent right of an individual to a change of venue" where community prejudice prevents a fair trial. A fortiori there must be a right to make a showing of prejudice—otherwise this vital constitutional right cannot be vindicated. A law which by its terms limits the right to make such a showing to felonies violates due process of law." (232 F. Supp. at 542-543) In affirming, the Court of Appeals declared that:

> Due process of law requires a trial before a jury drawn from a community of people free from inherently suspect circumstances of racial prejudice against a particular defendant. (364 F.2d at 7)

The court made it clear that in its view, "the same constitutional safeguard of an impartial jury is available to a man denied his liberty . . . for a misdemeanor as a felony. (*Ibid.*)

Similarly, fifteen years ago the Supreme Court of Oregon declared unconstitutional on due process grounds state statutes permitting a change of venue in felony cases only. *State ex rel. Rico* v. *Biggs,* 198 Ore. 413, 255 Pac.2d 1055 (1953). The Court recognized that the right to a fair and impartial trial is of constitutional dimensions and made it clear that any statute which attempts to limit this right runs afoul of the Constitution.

After extensive study, an American Bar Association Committee has recently fashioned standards for fair trial based on those enunciated by this Court in *Sheppard* v. *Maxwell, supra.* These standards, designed to guide courts in considering questions of change of venue, do not contemplate any distinction between felonies and misdemeanors, but call for action on the part of a trial court to protect the fairness of the trial "whenever" partiality is threatened. *Standards Relating to Fair Trial and Free Press,* Section 3.2(c) p. 9 (A.B.A. Project on Minimum Standards for Criminal Justice, 1966). Appellant submits this is the proper constitutional rule and that the Supreme Court of Wisconsin erred in holding otherwise.

II.

For Purposes of Change of Venue There Is No Rational Basis for a Distinction Between Persons Charged With a Felony and Persons Charged With a Misdemeanor.

The Equal Protection Clause of the Fourteenth Amendment commands that distinctions drawn by a State—whether in the exaction of pains or in the allowance of benefits—must not be irrelevant, arbitrary or invidious. Where a State chooses to grant an advantage to one class and not to others "[T]he attempted classification . . . must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis." *Gulf, Colorado and Santa Fe Ry.* v. *Ellis,* 165 U.S. 150, 155, 159 (1897). See, e.g., *Skinner* v. *Oklahoma,* 316 U.S. 536 (1942); *Baxstrom* v. *Herold,* 383 U.S. 107 (1966).

The lesson of this Court's decisions construing the Equal Protection Clause is that there can be no difference in treatment among citizens unless there is a rational distinction between the classes affected. Or, to put it another way, where no rational distinction exists between two persons or classes, the law must treat them alike. By these standards, W.S.A. §956.03(3) is patently invidious, irrational, hence unconstitutional legislation. For purposes of the relevant constitutional requirement of a fair and impartial trial, the label attached to a crime cannot reasonably dictate the character of the procedural protections offered.

The irrationality of making the benefits of change of venue available to one class of accused citizens faced with community prejudice, while withholding them from another class is further highlighted by an examination of the terms involved in the classification. At early common law no crime was considered a felony if it did not result in a total forfeiture of the offender's land or goods or both. *Kurtz* v. *Moffitt*, 115 U.S. 487 (1885); *People* v. *Causley*, 399 Mich. 340, 300 N.W. 111 (1941). See also Goebel, FELONY AND MISDEMEANOR (1937). Wisconsin has defined a felony as "A crime punishable by imprisonment in the state prison," W.S.A. §939.60 and a misdemeanor as "Every other crime," *ibid.* However, there is neither historical consistency nor universal agreement on any principle which governs the selection of offenses to be felonies or misdemeanors. There is plainly nothing categorical about these categories nor anything inherent in their logic which would make rational the distinction that Wisconsin attempts to rest upon them. Legislatures can, and from time to time do, change their definition of what constitutes a felony or misdemeanor for a variety of penological purposes. Under the reasoning of the court below, they could

by such legislation incidentally collapse or expand the protection of the right to a fair trial. The Constitution cannot countenance a rule which permits such adventitious irrational and arbitrary tampering with fundamental constitutional rights.

From a constitutional perspective, for purposes of change of venue, the "felony-misdemeanor" distinction is simply irrelevant. For an analogous discussion where the constitutional right to trial by jury and right to counsel is involved, see *Duncan* v. *Louisiana*, 391 U.S. 145 (1968); *Beck* v. *Winters*, 407 F.2d 125 (8th Cir. 1969); *Harvey* v. *Mississippi*, 340 F.2d 263 (5th Cir. 1965); *James* v. *Headley*, —— F.2d —— (5th Cir. 1969 No. 25,892). Since the line of demarcation between felony and misdemeanor in Wisconsin law is totally unrelated to the reasons that a change in venue is allowed, or may be constitutionally required, a statute which makes the right turn on that distinction violates the Equal Protection Clause.

CONCLUSION

For the Foregoing Reasons, Probable Jurisdiction Should Be Noted.

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APPENDIX

APPENDIX

Opinion of the Supreme Court of Wisconsin

STATE OF WISCONSIN,

Respondent,

v.

JAMES EDMUND GROPPI,

Appellant.

No. 38

Supreme Court of Wisconsin

Feb. 4, 1969

This appeal arises from an incident which occurred in the city of Milwaukee, on August 31, 1967. Prior to the time of the incident, and more particularly on August 30, 1967, the mayor of Milwaukee, Henry W. Maier, caused an emergency proclamation to issue which ordered that:

> "• • • marches, parades, demonstrations, or other similar activities are prohibited upon all public highways, sidewalks, streets, alleys, parks and all other public ways and public grounds within the City of Milwaukee between the hours of 4:00 o'clock P.M. and 9:00 o'clock A.M., commencing on this date, Wednesday, August 30, 1967, at 4:00 o'clock P.M. and terminating thirty (30) days thereafter."

The appellant (hereinafter referred to as the "defendant") Father James Edmund Groppi, was arrested on August 31, 1967, for allegedly violating the proclamation during the course of a civil rights demonstration. In the course of his arrest, defendant was alleged to have resisted the arresting officer. This appeal is concerned solely with

the charge of resisting an officer. Any reference to the charge resulting from the violation of the proclamation is purely incidental.

Prior to the commencement of the trial on the "resisting" charge, defendant moved for a change of venue on the grounds of community prejudice. The motion was denied on the ground that sec. 956.03(3),[1] Stats., provided for a change of venue for community prejudice only in felony matters. Resisting an officer is a misdemeanor.

Also prior to trial a subpoena was executed and served which ordered Henry W. Maier to appear to testify on behalf of the defendant on February 8, 1968. That subpoena was subsequently quashed following a hearing which resulted in the trial court's finding that Mayor Maier could not offer any relevant testimony to the case before the court.

After a trial by jury, the defendant was determined to be guilty of resisting an officer. He was fined $500 and sentenced to six months in the house of correction. Sentence, however, was stayed, and defendant was placed on two years' probation. The appeal is taken from the judgment of conviction and the order of sentence.

HANLEY, Justice.

The defendant presents the following issues on this appeal:

1. Is sec. 956.03(3), Stats., unconstitutional either on its face or as applied in this case?

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[1] "If a defendant who is charged with a felony files his affidavit that an impartial trial cannot be had in the county, the court may change the venue of the action to any county where an impartial trial can be had. Only one change may be granted under this subsection."

2. May a trial court quash a subpoena which has been properly issued and served upon a witness the defendant desired to call in his defense?

Unconstitutionality of Sec. 956.03(3), Stats.

Appellant claims the change of venue statute is unconstitutional on several different grounds: First, that the statute, on its face, is a violation of due process as guaranteed by the Wisconsin and federal constitution; second, that the face of the statute violates the equal protection clause of the federal constitution. And, finally, it is contended that the statute was unconstitutionally applied in this case. In all cases, the reason for the alleged unconstitutionality is the same, i.e., that the change of venue based on community prejudice is limited to felony cases.

We think that there is a sufficient difference between a felony and a misdemeanor to warrant the distinction.

> "• • • In most cases the place of imprisonment is different; the statute of limitations is twice as long for a felony as a misdemeanor; one charged with a felony is entitled to a preliminary hearing; the stigma of a felony is greater; and under the repeater statute, more severe penalties are authorized for felonies than for misdemeanors. • • •" State ex rel. Gaynon v. Krueger (1966), 31 Wis.2d 609, 620, 143 N.W.2d 437, 443.

Moreover, it would be extremely unusual for a community as a whole to prejudge the guilt of any person charged with a misdemeanor. Ordinarily community prejudice arises when a particularly horrendous crime has been perpetrated. These are the only crimes that receive widespread and pro-

longed attention from the news media. But the general public just does not become incensed at the commission of a misdemeanor.

[1] The court also takes judicial notice of the vast number of misdemeanors that are prosecuted as opposed to felonies. As a matter of necessity, the prosecution of misdemeanors has been simplified as much as possible by the legislature. This is not because the legislature is not concerned with justice, but because society demands that efficiency in the administration of justice be given consideration along with absolute fairness.

This court faced a decision similar to the one in this case in deciding whether an indigent accused of a misdemeanor was entitled to the assistance of a court-appointed attorney in his defense. At that time the court stated:

> "A basic concern of this court must be to strive for greater fairness in the administration of criminal justice. This contemplates protection of the innocent from wrongful conviction, and a concern for the poor as well as for the affluent. A correlative consideration, nevertheless, must be to protect society from burdens that, if intolerable, might impair the administration of justice. Achieving the proper equilibrium between these important considerations inherently requires that standards be established, thus presenting a situation in which it is difficult to achieve an ideal result." State ex rel. Plutshack v. State Dept. of Health & Social Services (1968), 37 Wis.2d 713, 721, 155 N.W.2d 549, 553, 157 N.W.2d 567.

The court decided in the *Plutshack* Case that counsel should be provided for all indigent defendants who were

charged with a crime which was punishable by a maximum sentence of more than six months' imprisonment. This was determined to be a reasonable cutoff point.

It is also important to recognize that in deciding the *Plutshack* Case, the court was not faced with a statute which specifically denied the appointment of counsel to indigents charged with misdemeanors. On the contrary, the applicable statute, sec. 957.26,[2] Stats., had recently been amended[3] so that counsel could be provided in misdemeanor cases. Thus the court was free to adopt the six-month cutoff.

However, in this case, the applicable statute specifies that a change of venue based on community prejudice shall only be permitted in felony cases. Were we free to adopt our own cutoff point, we would establish it at over six months, as we did in reference to the appointment of counsel. However, we are not willing to say that the cutoff point established by the legislature is necessarily arbitrary and capricious.

The court is aware that two other jurisdictions have considered whether a change of venue based on community prejudice can be limited to felony cases.[4] Both decided it could not be without violating the due process clause of the Fourteenth amendment to the federal constitution. Those

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[2] "957.26 Counsel for indigent defendants charged with felony; advice by court. (1) A person charged with a crime shall, at his initial appearance before a court or magistrate, be advised of his right to counsel and, that in any case where required by the United States or Wisconsin constitution, counsel, unless waived, will be appointed to represent him at county expense if he is financially unable to employ counsel."

[3] Ch. 519, Laws of 1965, amended sec. 957.26(1). Previously that section provided for the appointment of counsel only when a defendant was charged with a felony.

[4] Pamplin v. Mason (5th Cir. 1966), 364 F.2d 1; State ex rel. Ricco v. Biggs (1953), 198 Or. 413, 255 P.2d 1055, 38 A.L.R.2d 720.

cases are not precedent for this court and their reasoning does not compel us to reach the same conclusion.[4a]

The United States Supreme Court held in Rideau v. Louisiana (1963), 373 U.S. 723, 83 S.Ct. 1417, 10 L.Ed.2d 663, that a denial of a change of venue, under the circumstances of that case,[5] amounted to a denial of due process. That case is distinguishable on two grounds. First, it involved a felony, as does every other case in the area of change of venue which has been dealt with by the Supreme Court. Second, the defendant put into the record his proof of community prejudice which was at least likely to influence the jury. No record of community prejudice was ever made in this case.

[4a] The United States Supreme Court recently considered whether a state could constitutionally deny a jury trial to persons accused of a misdemeanor. Duncan v. Louisiana (1968), 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491.

The court held that every person had a fundamental right to a jury trial even in state prosecutions if he was charged with a "serious" crime, whereas no such right existed if a person was charged with a "petty" offense. The court refused to draw a distinct line between a petty offense and a serious offense, but the majority did state that any crime punishable by two years' imprisonment, or more, was a serious crime. The court further indicated that, under federal law, a crime involving a maximum sentence of six months, or less, was a petty offense. No opinion was expressed as to the classification of those crimes which involved a maximum sentence of more than six months but less than two years.

In Wisconsin, no misdemeanor is punishable by more than one year of imprisonment.

[5] The circumstances in *Rideau*, supra, were extreme. A twenty-minute film and sound track of the defendant's being "interviewed" by the sheriff was shown over television on three separate occasions. During the course of the interview, the defendant admitted robbery, kidnapping and murder. The Supreme Court decided, without examining the transcript of the *voir dire*, that due process required a trial before a jury drawn from a community of people who had not seen and heard the televised "interview."

Appellant contends that because his motion for change of venue was denied, he had no opportunity to make a record of the community prejudice. This is simply not true. Both the federal and state constitutional guarantee to every accused the right to a fair and impartial trial.[6] A verdict from a prejudiced jury is void[7] whether or not a change of venue or a continuance was requested.[8] On motions after verdict or on a petition for habeas corpus, a person convicted of either a misdemeanor or a felony can offer proof that he was denied his constitutional right of a fair and impartial trial.[9]

[2] The right to a fair and impartial trial is not synonymous with a change of venue. The only connection between a change of venue and a fair and impartial trial is that the former is one method of insuring the latter. Other methods

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[6] Art. I, sec. 7, Wisconsin Constitution:

"In all criminal prosecutions the accused shall enjoy the right * * * to a speedy public trial by an impartial jury * * *."

Sixth amendment, United States Constitution:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury * * *."

[7] "Petitioner's detention and sentence of death pursuant to the *void judgment* is in violation of the Constitution of the United States and he is therefore entitled to be freed therefrom. * * *" (Emphasis supplied.) Irvin v. Dowd (1961), 366 U.S. 717, 728, 81 S.Ct. 1639, 1645, 6 L.Ed.2d 751.

[8] This seems to be the only logical conclusion following the decision in Sheppard v. Maxwell (1966), 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed.2d 600. The verdict of the jury was set aside based on prejudice even though no motion for a change of venue or continuance was made.

[9] The express holding of Irvin v. Dowd, supra, seems to be that a statute which denies a change of venue is not unconstitutional, either on its face or in its application, so long as the statute is not relied upon to deny a person his right to a fair and impartial trial.

of insuring a fair trial are voir dire proceedings and continuance.[10]

[3] The defendant here was not denied due process when his change of venue was denied because of the applicable statute. Should a rare case arise where community prejudice threatens to influence the verdict in a misdemeanor case, the defendant can rely on the antiseptic measures of continuance and *voir dire* proceedings. In the event that these measures are still not sufficient to provide an impartial jury, the verdict can be set aside after trial based on the denial of a fair and impartial trial.

[4] If the defendant in the present case feels that he was denied a fair and impartial trial (no such claim has been made to this court), the issue can be raised and evidence can be presented on a motion for a new trial based on a denial of a fair and impartial trial.[11]

Quashing a Subpoena.

Defendant also contends that it is unconstitutional to deny to a defendant in a criminal action the right to sub-

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[10] "The remedies in publicity cases are change of venue, continuance, and careful selection of a jury." State v. Woodington (1966), 31 Wis.2d 151, 166, 142 N.W.2d 810, 817, 143 N.W.2d 753.

[11] Sec. 958.06(1), Stats., provides:

"Within *one year* after the trial and on motion of the defendant the court may grant a new trial * * *." (Emphasis supplied.)

The trial in this case ended on February 9, 1968. Some motions after verdict were presented on February 12, 1968, and denied. It does not appear that the presentation of those motions would foreclose the presentation of a motion for a new trial based on an entirely different ground.

poena any witness even if the witness' testimony is admittedly irrelevant.

[5] The Sixth Amendment to the United States Constitution and art. I, sec. 7, of the Wisconsin Constitution guarantee to a defendant in a criminal case the right "to have compulsory process" to obtain witnesses in his behalf. This right is now incorporated in the due process clause of the Fourteenth Amendment to the federal constitution and applies equally to the several states.[12] It is also worthy of note that there has been no attempt to limit this right to persons charged with a felony.[13]

In this case, the defendant subpoenaed the mayor of Milwaukee. After the subpoena issued, an assistant city attorney, representing the mayor, moved for an order to show cause why the subpoena should not be quashed. The day before the trial a hearing was held on that order. The attorney for the city argued that the mayor had no personal knowledge of any facts which would be material to the resisting arrest charge against Father Groppi. Counsel for the defendant contended that they hoped to establish by the mayor's testimony either that the proclamation was unconstitutional on its face or that it was unconstitutionally issued. The judge took the motion to quash under consideration until the next day.

The following morning, the defendant withdrew a motion to dismiss the charge based on the unconstitutionality of the proclamation because that issue was pending in the

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[12] Washington v. Texas (1967), 388 U.S. 14, 87 S.Ct. 1920, 18 L.Ed.2d 1019.

[13] Sec. 955.04, Stats., provides:

"Any defendant shall have compulsory process to compel the attendance of witnesses in his behalf."

federal court and could best be determined there. The trial court then quashed the subpoena because the issue of the unconstitutionality of the proclamation had been withdrawn. The defendant insisted at that point, and during the trial, that he had a constitutional right to call the mayor.

The defendant has explained in his brief on this appeal why the testimony of the mayor was relevant to this case:

> "* * * had the defendant been able to demonstrate by the testimony of Mayor Maier that the ordinance under which he was initially arrested was illegally promulgated either because of the procedures used or because it was unconstitutional or because it was applied unconstitutionally there can be no question but that the appellant could have legitimately challenged his arrest as illegal and unauthorized. * * *"

[6] We first determine that a defendant does not have an unqualified right to subpoena witnesses. This right is no more absolute than any of the other rights guaranteed by the constitution.

[7] It is readily apparent that a defendant suffers no constitutional deprivation when he is limited to subpoenaing witnesses who can offer relevant and material evidence on his behalf. The proposition is so apparent on its face that it is difficult to find legal citation to support it. However, at least one English case has considered this precise issue. In King v. Baines (1908), 1 K.B. 258, the defendants, who were demonstrating for women's suffrage, were arrested for breach of the peace and unlawful assembly. They subpoenaed Prime Minister Herbert Henry Asquith and Home Secretary Herbert John Gladstone to testify at their

trial. The subpoenas were subsequently set aside upon proof that neither subpoenaed party could give any relevant testimony at the trial. The setting aside of the subpoenas was upheld on appeal.

[8] We think a subpoena is properly quashed when a party is unable to give relevant evidence.

[9] We also decide that the testimony which the defendant sought from Mayor Maier was immaterial to the resisting arrest charge. It is not necessary to decide whether that testimony would have been relevant if the constitutionality of the proclamation was in issue. That issue was specifically withdrawn from this case.

In the absence of some showing by the defendant that the witness was necessary for his defense, the quashing of the subpoena is not a violation of a defendant's right to compulsory process.

We conclude that sec. 956.03(3), Stats., is constitutional and that the trial court's judgment of conviction and order of sentence were proper.

Judgment and order affirmed.

HALLOWS, Chief Justice (concurring).

I concur in the result only of the majority opinion because I believe with the minority that an accused has a constitutional right to a fair trial in misdemeanor cases and to attain that end may have a change of venue if he shows community prejudice. The minority opinion well states the view that sec. 956.03(3), Stats., is regulatory only of this basic right to a fair trial and is not exclusive by implication. The right to a change of venue to secure a fair trial is consistent with my belief that an accused has a constitutional right to an attorney in all misdemeanor cases,

which was expressed in Sparkman v. State (1965), 27 Wis.2d 92, 102, 133 N.W.2d 776, and again in the dissent in State ex rel. Plutshack v. State Department of H&SS (1968), 37 Wis.2d 713, 727, 155 N.W.2d 549, 157 N.W.2d 567.

I differ with the minority in its remedy in this case. To these facts I would apply the harmless-error rule as stated in Whitty v. State (1967), 34 Wis.2d 278, 149 N.W.2d 557, cert. denied 390 U.S. 959, 88 S.Ct. 1056, 19 L.Ed.2d 1155. Not every violation of a constitutional right requires a reversal or a new trial. Prejudice resulting from error or the denial of a constitutional right must be shown. In the instant case, the defendant had no difficulty in selecting and obtaining a satisfactory jury and one which on the record he does not claim was biased or unfair.

The exercise of the constitutional right to a change of venue on the ground of community prejudice is a means to secure an unprejudiced and fair jury so that a fair trial may be assured. If such a saturation of prejudice exists in a community from which the jury is drawn so as to make it difficult to select and obtain an impartial jury, then it is better to change the venue of the case than to waste time attempting to find an unprejudiced jury. But a juror's knowledge of events is to be distinguished from prejudice or predetermined opinion. One may have knowledge without prejudice. The members of a jury may be informed without the jury being prejudiced. I think also that community prejudice has little or no effect on a witness. The argument that a witness will testify differently in one county than he will in another is unconvincing. No matter where the witness testifies, he must live in the community from which he comes.

On the facts of this case, I see no reason for a reversal.

HEFFERNAN, Justice (dissenting).

I respectfully dissent from the opinion of the Court insofar as it holds sec. 956.03, Stats., prohibits a change of venue in misdemeanor cases and that such legislative prohibition is constitutional.

To understand what the majority has done, it is necessary to review the facts. It is crystal clear from the record that the defendant moved for a change of venue on the basis of community prejudice. Such prejudice was alleged in the underlying affidavits supporting the motion. The defendant's trial counsel also asked that the court take judicial notice of the "massive coverage by all news media in this community of the activities of this defendant • • • or, in the alternative, that the defendant be permitted to offer proof of the nature and extent thereof, its effect upon this community and on the right of defendant to an impartial jury trial." This motion was denied in its entirety. The reason for such a denial, including the reason for the refusal to hear evidence of prejudice, is made clear by the remarks of the trial judge following the denial of the motion.

Counsel asked if the court was denying the motion "because the statute will not permit a change of venue on the grounds of community prejudice. • • •" The court replied, "No, I'm denying the motion • • • because this is a misdemeanor case and not a felony. And the Wisconsin Statute does not provide for a change of venue in a misdemeanor matter."

It is thus apparent that the judge refused to hear evidence on community prejudice solely because he concluded that the statute gave him no jurisdiction to order a change of venue even if community prejudice were shown.

This, I conclude, is a clear error of law, and the statute as so construed was applied unconstitutionally. The statute is procedural only. It merely specifies the duty of the judge when prejudice is apparent and the defendant is charged with a felony. It is silent upon the duty of a judge in the event one charged with a misdemeanor asks for a change of venue because of community prejudice. The prohibition that the trial judge found, at least by implication, in the statute is not apparent to this writer.

We have heretofore held, in State v. Nutley (1964), 24 Wis.2d 527, 129 N.W.2d 155, overruling, sub silentio, State ex rel. Carpenter v. Backus (1917), 165 Wis. 179, 161 N.W. 759, to the contrary, that a change of venue for community prejudice is a constitutional right independent of the legislative procedural implementation. In *Nutley,* 24 Wis.2d page 566, 129 N.W.2d page 160, we pointed out that the portion of sec. 956.03(3), Stats., providing, "Only one change may be granted under this subsection," was subject to the due process limitations of the fourteenth amendment to the United States Constitution.

In effect, this court recognized, at least in a felony case, that the power of a court to order a change of venue arose not from the statute but from its inherent power to act to assure a fair trial, and, as required, by the fourteenth amendment.

Are there any reasons why this constitutional assurance of a fair trial by the device of change of venue should be available only to one charged with a felony and not to an alleged misdemeanant?

The majority opinion concludes that it is just and proper to afford fewer constitutional guarantees of fairness to a misdemeanant than to a felon. On the face of it this proposition runs counter to all principles of Anglo-American

jurisprudence; however, factual distinctions, it is contended, make it fair to afford fewer protections to one charged with a misdemeanor. It is asserted in the opinion of the majority of the Court that the penalties are more severe in the case of felonies. This is, of course, true, but it is a fact entirely irrelevant to the issue. It is, in essence, an assertion that an unfairness that results in only a small sentence is of such a minor consequence as to be *de minimis*. The mere statement of the proposition is its own refutation. Concededly, the legislature has seen fit to *confer* additional safeguards to defendants accused of major crimes (preliminary hearing, e.g.); however, it is powerless to reduce the minimum safeguards of fairness that are assured by both the Wisconsin and United States Constitutions to all criminal defendants.

The opinion of the court also asserts that community prejudice is not aroused by the commission of a misdemeanor and that, therefore, a change of venue is needless. The simple answer to this proposition is that if there is no community prejudice, it is within the discretion of the trial judge to deny a change of venue. This determination is dependent upon the facts as they subjectively appear and not upon the objective nature of the crime or whether it is labeled a felony or a misdemeanor. The identity of the defendant and his image in the community is also relevant and may be a determining factor in whether or not there is community prejudice, irrespective of the nature or seriousness of the crime charged.[1] To say that the public is not

[1] The attorney general in his addendum to the district attorney's brief acknowledged that, "Appellant is a controversial figure, but not only in Milwaukee county." While this statement was made by the attorney general to show that a trial in another county might not result in a trial free from prejudice, it is equally probative of

prejudiced or enraged by the commission of a misdemeanor begs the question. That is precisely what a hearing for a change of venue is intended to determine, and this is what the defendant herein sought to prove. For this Court to decree that prejudice will henceforth not exist in a trial for a misdemeanor is reminiscent of King Canute's edict to hold back the tides.

It is, of course, true that it will be only the unusual and infrequent misdemeanor cases that will become a cause celebre and arouse popular passions. Granting the premise, on which the majority opinion is in part based, that there will be few misdemeanors that will arouse the emotions of the public, how can the rare case so clog the courts with motions for change of venue that the efficient and expeditious disposition of criminal cases will be in jeopardy. The majority opinion's fears are of a bogeyman of court congestion which its own reasoning shows to be without foundation. Moreover, there is no reason why this Court should assume that motions for change of place of trial will be abused or that our courts are so supine as to tolerate such abuse.

While it may be conceded that procedurally it is within the legislature's power to adopt more expeditious methods of handling misdemeanors than felonies, it may not do so if constitutional rights are thereby encroached upon. The

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the assertion that the defendant could not have received a fair trial anywhere in the state. This, however, is no reason why a change of venue should not have been granted, for under *Nutley*, supra, this court has decided that the defendant is not remediless after one change of venue. If it developed that a fair trial could have been held nowhere in the state, a motion for continuance would then have been appropriate. The first obligation of the trial court was to consider a change of venue so the defendant could be speedily tried.

legislature may grant the right to a preliminary hearing to a felon, but not to a misdemeanant, but this right is statutory not constitutional. For example, it cannot, under the aegis of greater efficiency in the administration of justice, deny misdemeanants the right to jury trial guaranteed by the Wisconsin Constitution. While efficiency and economy are of great significance in cases where the courts are free to act one way or the other, they have no place in the situation now before us, where this court, as well as the legislature, is answerable to the Constitution.

The recent United States Supreme Court decision, Duncan v. Louisiana (May 20, 1968), 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491, pointed out that under the sixth amendment and the fourteenth amendment to the United States Constitution petty offenses could be tried before a judge only. This decision, of course, does not obviate the necessity for a jury trial for misdemeanors in a state like Wisconsin, where a jury trial is available to all defendants. *Duncan,* however, makes it crystal clear that a trial, before whomsoever held, must be fair. Justice Harlan, although dissenting in *Duncan* and agreeing that a state by its own constitution should be able to determine the necessity of a jury trial, stated there were nevertheless certain prerequisites to a system of ordered liberty, one of them being a fair trial. He said, "I should suppose it obviously fundamental to fairness that a 'jury' means an 'impartial jury.'" (Pp. 181, 182, 88 S.Ct. p. 1466.)

In the instant case, a jury is guaranteed by the Wisconsin Constitution, and *Duncan* makes it clear that a jury must be impartial. A litigant is constitutionally entitled to invoke the device of change of venue to determine whether or not a trial may be had free from the contamination of com-

munity prejudice. Where the trial of a misdemeanant is before a judge, under Wisconsin law he may file an affidavit of prejudice if he thinks it necessary to assure a fair trial. He should not have a lesser right to a fair and impartial trial if he invokes his constitutional prerogative of trial by jury.

Nor is State ex rel. Plutshack v. State Department of Health and Social Services (1968), 37 Wis.2d 713, 155 N.W. 2d 549, 157 N.W.2d 567, relevant to this case. Contrary to the assertion of the majority opinion, this court, therein, was not influenced or controlled by sec. 957.26, Stats. It was controlled by the rulings of the United States Supreme Court which have been interpreted to mean that there shall be counsel whenever a "substantial sentence" may be imposed. The opinion of the Court in *Plutshack* was influenced by legislation only to the extent that we concluded that congressional legislation (Criminal Justice Act of 1964) was declaratory of constitutional requirements.

In the instant case we have elevated the legislature's enactment of sec. 956.03, Stats., to the status of a limitation on the constitutional rights of citizens accused of crime. To do so is, I believe, a misinterpretation of a statute the legislature intended to be procedural only and constitutes an abdication of a constitutional responsibility of this Court.

We are herein in no way bound or guided, as we said we were in *Plutshack,* by legislation that appears to us to be declaratory of a proper constitutional standard already found by the Supreme Court of the United States. In the instant case what the legislature had to say about change of venue in felony cases is irrelevant to a constitutional right of an alleged misdemeanant.

This writer is of the opinion that the trial court and the

majority of this Court interpreted the statute in such a way as to deprive misdemeanants of important constitutional rights. In State ex rel. Ricco v. Biggs (1953), 198 Or. 413, 255 P.2d 1055, the Oregon Supreme Court, faced with a similar statute, pointed out that such an interpretation violated the Oregon constitutional guaranty of a fair trial (similar to Wisconsin's), as well as the due process clause of the fourteenth amendment. That court pointed out, as does this dissent, that the legislative enactment does not govern whether a misdemeanant is entitled to a change of venue, for the right to a changed place of trial depends not upon legislative consent but upon the constitutional right of fair trial.

It is the opinion of this writer that the inherent power of a court to order a change of venue for community prejudice is beyond question.

This writer would also conclude that in any criminal case a court of justice has the inherent duty, where the question is raised, to inquire into the matter of community prejudice and to hold a hearing in order to exercise its discretion in respect thereto. This duty is constitutional, not statutory, and in proper circumstances should be exercised *sua sponte*.

Nor can I agree with the majority opinion's conclusion that even though a change of venue could or should have been granted, a fair trial is still assured by the procedures of the voir dire and motions after verdict.

This is hardly an argument for efficient judicial administration for if an atmosphere of prejudice or unfairness can be detected prior to trial, it is folly to spend the public's money on a trial that will be set aside.

No doubt, motions after verdict are useful safety devices to correct error that perhaps has already occurred, but the goal of the proper administration of justice is the avoid-

ance of error. The device of change of venue seeks the avoidance of error.

Moreover, the test of community prejudice is not whether an impartial jury can or cannot be impaneled but whether there is a "reasonable likelihood" that community prejudice exists. Sheppard v. Maxwell (1966), 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed.2d 600.

The American Bar Association Advisory Committee on Fair Trial and Free Press at pages 126, 127, and 128 discussed the efficacy of the *voir dire* as a guaranty of a fair trial:

> "It has in many jurisdictions been common practice for denial of such a motion to be sustained if a jury meeting prevailing standards could be obtained. There are two principal difficulties with this approach. First, many existing standards of acceptability tolerate considerable knowledge of the case and even an opinion on the merits on the part of the prospective juror. And even under a more restrictive standard, there will remain the problem of obtaining accurate answers on *voir dire*—is the juror consciously or subconsciously harboring prejudice against the accused resulting from widespread news coverage in the community? Thus if change of venue and continuance are to be of value, they should not turn on the results of the *voir dire;* rather they should constitute independent remedies designed to assure fair trial when news coverage has raised substantial doubts about the effectiveness of the *voir dire* standing alone.
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> "The second difficulty is that when disposition of a motion for change of venue or continuance turns on the results of the *voir dire,* defense counsel may be

placed in an extremely difficult position. Knowing conditions in the community, he may be more inclined to accept a particular juror, even one who has expressed an opinion, than to take his chances with other, less desirable jurors who may be waiting in the wings. And yet to make an adequate record for appellate review, he must object as much as possible, and use up his peremptory challenges as well. This dilemma seems both unnecessary and undesirable. * * *

"The suggestion of some courts that * * * [failure to exhaust all peremptory challenges] amounts to a waiver [of a right to transfer or continuance] seems to require the defendant to take unnecessary risks. If the defendant has satisfied the criterion for the granting of relief, it should not matter that he * * * has failed to use his peremptory challenges, perhaps because he prefers the ills he has to others he has not yet seen."

In State v. Nutley, supra, 24 Wis.2d pages 565, 566, 129 N.W.2d page 172, this Court accepted the conclusion that a *voir dire* does not necessarily assure a trial free from the contamination of community prejudice:

"The United States supreme Court has held that even if a defendant has examined prospective jurors at length during a *voir dire,* and even if the jurors state that they will evaluate the issues only on the evidence presented during the trial, a defendant may still be denied a fair trial if prejudicial pretrial publicity is of such quantitative and qualitative magnitude that it is probable that the jurors predetermined the issue despite their protestations to the contrary. This rule of

> Fourteenth amendment due process is applicable even though the defendant may have received one change of venue, pursuant to a state statute similar to sec. 956.03, Stats."

True, this court has in numerous cases looked to the *voir dire* to determine that a trial was free from the taint of prejudice. This technique, while efficacious in some cases, is directed primarily to the question of whether a trial judge abused his discretion in determining that the prejudice alleged or proved was not of such a nature as to prevent a fair trial. Here, abuse of discretion is not in question. The trial judge here relied upon his interpretation of a statute and concluded that he was precluded by law from granting a change of venue. Discretion was not exercised. Hence, the error was one of law and the usual *voir dire* cases are not directed to the issue raised herein.

Mason v. Pamplin (D.C.1964), 232 F.Supp. 539, 540, 541, 542, 543 (Affm'd Pamplin v. Mason (5 Cir. 1966), 364 F.2d 1), a case involving the right of a change of venue in a misdemeanor case where the Texas statute referred only to felonies, stated:

> "The record reflects that the prospective jurors, who apparently qualified as a group, stated that they did not know petitioner; that they had not formed any opinions in the case; and that they had no prejudices against the Negro race, or against a Negro acting as counsel for petitioner. No testimony on this question, other than the sworn statement of petitioner's counsel, was offered at the hearing on the motion for new trial.
> • • •

"Whatever doubt may have existed prior to 1960 with respect to the inherent right of an individual to a change of venue if he demands a jury trial, and it is made to appear that in the county where the prosecution is begun an impartial jury cannot be impaneled, was dispelled by the Supreme Court in Irvin v. Dowd, 366 U.S. 717, 721, 81 S.Ct. 1639, 1641, 1642, 6 L.Ed.2d 751 (1960), when it recognized the proposition that a transfer may become a *necessity,* depending upon 'the totality of the surrounding facts.' Such 'totality' cannot be achieved if the court is precluded by law from hearing any competent evidence which may be offered before, during or after trial for the purpose of showing one's inability to obtain a fair and impartial trial in a particular county. • • •

"The hearing on the change of venue is the first and most important step in ascertaining whether or not the accused can receive a fair and impartial trial in the county in which the prosecution is pending. The void which is left when the initial hearing is dispensed with could hardly be filled in a misdemeanor case, any more than it could in a felony case, by the subsequent voir dire examination of prospective jurors in a group, or by producing at a hearing on a motion for new trial testimony the Court has previously refused to hear. • • •

"If the allegations made by [petitioner] had been found to be true [at a venue hearing], he would have been entitled to a change of venue, irrespective of the fact that the jurors themselves as a group indicated that they had no prejudices. As the Supreme Court said in Dowd: 'No doubt each juror was sincere when

> he said that he would be fair and impartial to petitioner, but the psychological impact requiring such a declaration before one's fellows is often its father.' 366 U.S. 717, 728, 81 S.Ct. 1639, [1645, 6 L.Ed.2d 751]."

The denial of the defendant's motion, which in the alternative asked for a hearing on community prejudice, denied the defendant (contrary to the assertion of the majority opinion) an opportunity "to make a record of community prejudice." This is true because the judge made it clear that, in the case of a misdemeanor, community prejudice was irrelevant to a change of venue—there was just no statutory authority for such change. In motions after verdict defendant asked for a new trial on the ground, among others, that the court erred in denying the motion for change of venue on the assumption that the statute applied only to felony cases. This motion was again denied. The defendant also asked for a new trial on the ground that the one accorded him was unfair.

The defendant's motion was denied without hearing or explanation. It is apparent that the trial judge, relying on his interpretation of the law, refused to look to the alleged facts of community prejudice, and afforded the defendant no opportunity to make a record.

I would reverse the judgment of the circuit court and order a new trial, directing the trial court that, in the event a motion for change of venue is made, to exercise its discretion to determine whether or not the facts adduced at hearing warrant the granting of a change of venue.

I am authorized to state that Mr. Justice WILKIE joins in this dissent.